No. 13-1496

In The
Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,

Petitioners,

v.

MISSISSIPPI BAND OF
CHOCTAW INDIANS, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF AMICUS CURIAE OF THE SOUTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The South Dakota Bankers Association ("SDBA")[1] is a voluntary association of banks doing business in South Dakota. It has 86 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota's numerous Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the "*Montana*[2] exceptions" to the general rule that Indian tribes do not have regulatory or civil-adjudication over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.

SUMMARY OF ARGUMENT

Uncertainty as to the rules of the "economic game" leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations. The reluctance is understandable given the "special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S.

[1] The parties have consented to the filing of this brief, and their consent forms have been filed with the court. No counsel for either party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparations or submission of this brief. No person other than amicus curiae SDBA, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Montana v. United States*, 450 U.S. 544 (1981).

676, 693 (1990). The decision of the Fifth Circuit Court of Appeals in this matter eliminates important limitations to jurisdiction set by this Court in *Montana*. In a legal landscape already difficult for outsiders to navigate, the decision below injects greater uncertainty as to the rules of the game and increases the risks of doing business with tribes or tribal members who reside in Indian country. The net result of this uncertainty and risk will be further economic hardship for those living on and near Indian reservations.

ARGUMENT

In its amicus brief to this Court in *Plains Commerce*, the SDBA noted that lack of predictability as to future events is detrimental to the economy in general and to credit markets in particular. Brief for American Bankers Association and South Dakota Bankers Association as Amici Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008) (No. 07-411). At that time, SDBA asserted that uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can result in similarly injurious economic consequences. *Id.* at 2-3. That assertion remains true today. A primary source of reluctance on the part of non-Indian businesses to doing business on reservations is difficulty in determining and understanding "the rules of the game." The Fifth Circuit's decision in this matter exacerbates the uncertainties and risks of

doing business in Indian country by expanding tribal court jurisdiction to include the adjudication of tort claims against non-Indian defendants for punitive damages. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 418-19 (5th Cir. 2014).

The decision below incorrectly expands jurisdiction beyond what is "necessary to protect tribal self-government [and] to control internal relations" and exposes non-Indian businesses and individuals to much greater and almost unlimited risk. *See Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 332 (2008).

The proposition that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business in Indian country is well-recognized. As Justice Souter noted in his concurrence in *Nevada v. Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences given '[t]he special nature of [Indian] tribunals . . . '." 533 U.S. 353, 383 (2001) (quoting *Duro*, 495 U.S. at 693) (Souter, J., concurring). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus can never have a voice in changing procedural rules, substantive law

or other matters involving Indian tribunals with which they disagree. *See Duro*, 495 U.S. at 679.

In *Hicks*, Justice Souter noted the unique challenges facing an outsider attempting to grasp the applicable law in tribal court:

> [t]ribal law is still frequently unwritten, being based instead on the 'values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another' . . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.

533 U.S. at 384 (Souter, J., concurring). Interpreted in conjunction with tribal "customs, traditions, and practices," even readily-available written tribal ordinances and resolutions may take on a wholly different meaning from comparable state or federal statutes.

This case involves an area of law that is even more difficult for "an outsider to sort out" – that body of law not set forth in statute or written tribal regulation. Even where precedent exists, much of that precedent may be inaccessible from a practical perspective. Unlike the decisions of the highest state courts, many tribal court decisions are not available

to the public in any indexed or searchable format.[3] Most are not available through the leading legal research publishers. Accordingly, the ability for an "outsider" to use and rely on tribal precedent to guide its actions and determine risks is greatly limited by the ability to find precedent.

On top of these challenges, non-Indian defendants are also often confronted with tribal judicial systems that are underfunded, lack adequately-trained staff, and lack judicial independence. In this regard, the Mississippi Band of Choctaw Indians, with a robust economy and well-developed court system,[4] is not representative of the governmental

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[3] Efforts by third parties to compile tribal court decisions to enhance accessibility are admirable, but often fall short. For example, a compilation of Rosebud Sioux Tribal Court Decisions is maintained by the Sicangu Oyate Bar Association on that organization's website. This is a valuable resource to those wading into law in the Rosebud Courts. Yet, at the time of this writing, the list of decisions had not been updated since 2011. *See* Sicangu Oyate Bar Association, Appellate Decisions, http://sicanguoyatebar.org/appellate-decisions/ (last visited Sept. 1, 2015).

[4] The Harvard Project on American Indian Economic Development named the Mississippi Band of Choctaw Indians as a 2005 Honoring Nations honoree, recognizing its "vibrant economy" and the development of its judiciary, which includes the Indigenous Law Library, which interviews tribal elders to archive records of traditional values to be referenced and applied within the legal system. The Harvard Project on American Indian Economic Development, *Honoring Nations: 2005 Honoree*, 1 (2006), *available at* https://nnidatabase.org/db/attachments/text/honoring_nations/2005_HN_Choctaw_tribal_court_system.pdf.

and judicial realities in other parts of Indian Country. Chief Judge Ralph R. Erickson, from the District of North Dakota, offers a description more indicative of tribal courts in the Upper Midwest, when he states that tribal courts are "overwhelmed by problems rising out of a lack of adequate funding, a lack of adequately trained personnel, and a lack of true judicial independence."[5] He goes on:

> To describe the overall state of the facilities available to the tribal courts as wanting is an understatement. The Court recognizes that many of the tribes have taken herculean efforts to make do with judicial resources that state and federal courts would deem create a constitutional crisis. In short, many

[5] Recent decisions from South Dakota offer glimpses into the types of political struggles that embroil tribal judiciaries where there exists inadequate judicial independence. *See, e.g.*, *Wright v. Langdeau*, 2015 U.S. Dist. LEXIS 76307, *2 (D.S.D. June 10, 2015) ("In December of 2014, a tribal council meeting was held wherein Plaintiffs were attempting to ascertain the whereabouts of roughly $24 million in federal funding and how it could be that the current chief tribal judge was seated after allegedly being defeated in the election process."); *Lee v. Her Many Horses*, 2014 U.S. Dist. LEXIS 42626, *2 (D.S.D. Mar. 30, 2014) ("The amended complaint seeks a writ of mandamus against all the defendants and includes the following request for relief: (1) protection for Mr. Lee, as Chief Judge of the Oglala Sioux Tribal Court, from removal by the Oglala Sioux Tribe ("OST") Tribal Council; (2) protection for Rhonda Two Eagles, as OST Tribal Secretary, from removal by the OST Tribal Council; (3) protection for Mr. Bielecki from removal from the Pine Ridge Indian Reservation by the OST Tribal Council; (4) protection of the Treaty Council Members from arbitrary arrest. . . .").

> tribal courts are so short of resources and personnel that they constitute a national embarrassment.

United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1072-73 (D.N.D. 2009). Although jurisdiction may not hinge on the transparency, accessibility, or effective functioning of the tribal legal system, this is the backdrop of uncertainties already facing outsiders, to which the decision below adds further unpredictability and greater risk.

The Fifth Circuit's decision removes a powerful limitation on the extent of tribal jurisdiction over non-Indians set forth in *Montana*: that tribes may only regulate non-Indian conduct "*to the extent necessary*" to control internal relations. *Plains Commerce*, 554 U.S. at 332. The decision below concedes that "the tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members." *Dolgencorp*, 732 F.3d at 417. Yet, then the court then sets forth a standard under which tribal courts may impose theoretically unlimited punishment upon a non-Indian defendant in tort law, so long as there exists *some* nexus between the activity or person regulated and a consensual relationship with the tribe or its members. *Id.* at 415-17. The decision expands the regulatory power of the tribe, with regard to who and what fall under the tribal court's jurisdiction, and perhaps more importantly, *how* the tribe may impose punishment as a method of control over

those persons and activities. The decision renders the important limitations of *Montana* meaningless.

Where and against whom jurisdiction lies are important questions as banks and other entities assess the costs and benefits of doing business on a reservation. The nexus described by the Fifth Circuit needed to determine these questions sets forth a broad and ill-defined test for the assumption of tribal jurisdiction. *Dolgencorp*, 732 F.3d at 415-17. Under the lower court decision, the vague standard of foreseeability is used to determine whether a non-Indian defendant may be regulated by a tribe. The court opines that "a business operating on Indian land in a reservation is unlikely to be surprised by the possibility of being subjected to tribal law in tribal court." *Id.* at 415, n. 4. The test offers little guidance to non-Indians considering doing business with reservation Indians or tribes as to the extent that one business activity may trigger all forms of tribal authority over all persons or activities in any way related to that business on the reservation. For example, many tribes require non-Indian businesses to be licensed to operate on their reservation. Could applying for a business license make it "foreseeable" that the non-Indian business could be brought before tribal court for *any* act?[6] Could a tribal court determine that it

[6] The Supreme Court of the Mississippi Band of Choctaw seems to indicate that the answer to this question, under its interpretation of *Montana*, is a certain "yes," regardless of the act which gave rise to the dispute – so long as an act is committed on Indian land. *Doe v. Dollar General Corp.*, No. CV-02-05

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has jurisdiction over an employer for claims arising from of its employee's off-duty tortious acts on the reservation, if the employee would not have been on the reservation but for the business? Although such a claim would not be likely in state court, the foreseeability of the use of such an action under tribal law, incorporating traditions and customs, is difficult to determine.

Equally important is *how* the tribe exerts power in its attempt to "regulate" those entities and activities. "*Montana* expressly limits its first exception to the activities of nonmembers, allowing these to be regulated *to the extent necessary* to protect tribal self-government [and] to control internal relations." *Plains Commerce*, 554 U.S. at 332 (internal citations and quotations omitted) (emphasis added). The phrase "to the extent necessary" should be interpreted to place limits on the type and degree of "regulation" – or in this case, punishment – imposed upon non-Indians. Jurisdiction over claims for punitive damages, as the form of regulation presented in this case, in essence allows a tribal court to impose *any* degree of financial punishment on a non-Indian defendant. Punitive damages may be, and probably are, unchecked by tribal statutory limitation, and are

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(S. Ct. of Miss. Band of Choctaw Indians 2008) ("It strains credulity to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.")

not guided by Constitutional considerations applied in state and federal tribunals. *Compare State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412, (2003) ("Thus, while states enjoy considerable discretion in deducing when punitive damages are warranted, each award of punitive damages must, under the due process clause, comport with the principles set forth in *BMW of N. Am. v. Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589[.]") *with Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("[T]ribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Simply put, the extent of power exercised by the tribe in the form of financial punishment imposed on the non-Indian is unlimited. Despite the Fifth Circuit's note that "the goal of promoting tribal self-government" is "embodied in numerous federal statutes[,]" Congress has never approved of an extension of civil jurisdiction that would override this Court's instruction that the regulation and jurisdiction over non-Indians should only extend as far as is necessary to control internal relations or protect self-government.[7] This

[7] Congress has, in very limited areas and through very specific means, chosen to exercise its power to explicitly extend the reach of tribal court jurisdiction over non-members. For example, under the Violence Against Women Act, some tribal courts are now authorized to exercise criminal jurisdiction over some non-member defendants. *See* 25 U.S.C. § 1304 (conferring special domestic violence jurisdiction over non-Indians). In authorizing such jurisdiction, however, Congress also set forth detailed due-process protections, such as requiring that criminal

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Court should uphold the limitations in *Montana* and reject the use of such unlimited power to punish assumed by the tribe in this case.

Business needs certainty to flourish. "Where justice is uncertain, delayed, or denied entirely, it is completely predictable that economic stability will be difficult to obtain or maintain." *Cavanaugh*, 680 F. Supp. 2d at 1072. "The plain truth is that business owners will not locate businesses in places where the communities lack general order or where predictability of results in contractual or civil suits does not exist." *Id.* at 1072-73. For banks, the need for stability and predictability is especially important. Risk and uncertainty to banks really means risk and uncertainty to the depositors who have entrusted their money to the banks' safekeeping. If banks fear that making a loan or otherwise conducting business on a reservation may subject the depositors' money to great risk, or that the degree of risk is too difficult to calculate, those banks are less likely to extend credit and engage in business on reservations.

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laws and rules be made publicly available, ensuring the assistance of counsel, and requiring a "cross section of the community" jury. *Id.* Notably, even where Congress extended this criminal jurisdiction, it refrained from extending civil jurisdiction in related, and perhaps necessary areas. For example, although VAWA requires a "cross section" jury, it grants tribal courts no civil authority over non-Indians to hold non-Indian community members in contempt for failure to appear for tribal jury duty.

The need for more trade with, and economic activity on, Indian reservations cannot be understated. Since the decision in *Plains Commerce*, the economic conditions for reservation Indians, especially those in South Dakota, continue to be grim. As reflected by reports on the 2010 Census, reservation communities continue to top the list of those in deepest poverty:

> Of the five counties with poverty rates greater than 39 percent, four contain or are contained within American Indian reservations: Sioux County, N.D., which is contained within the Standing Rock Indian Reservation; Buffalo County, S.D., which contains the Crow Creek Indian Reservation; Shannon County, S.D., which is contained within the Pine Ridge Indian Reservation; and Todd County, S.D., which is contained within the Rosebud Indian Reservation.

U.S. Census Bureau, New Estimates Provide Detailed Look at Every Community in the United States, *available at* https://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn90.html. "[A]t recent rates of economic growth it would take decades for per capita income in Indian Country to converge with that in the rest of the US[.]"[8] Indian Country does not need greater barriers

[8] Randall K.Q. Akee & Jonathan B. Taylor, Taylor Policy Group, Social and Economic Change on American Reservations: A Databook of the US Censuses and the American Community Survey 1990-2010 15 (May 15, 2014), *available at* http://static1.

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to investment by, and trade with, off-reservation businesses.

The SDBA respectfully submits that greater certainty as to the limits of tribal jurisdiction, including limitations on tribal courts' ability to impose punitive damages on non-Indians, will encourage investment and economic activity on reservation communities. The greater uncertainty and increased risks created by the Fifth Circuit's misapplication of *Montana* will have detrimental effect on that economic potential. It is imperative that this Court ask if a tribal court wielding the powerful tool of unlimited punitive damages against a non-Indian defendant is "necessary" under *Montana* to control internal relations of the tribe under circumstances such as those presented in this case. The SDBA asserts that the exercise of such jurisdiction is not necessary or appropriate under *Montana*, and that upholding the decision below will have significant economic consequences for reservation economies across the United States.

squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDatabook2014-05-15.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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